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BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Removal of the)	
Funk's Dam Located on the Oconomowoc)	Case No. 3-SE-92-322
River, Waukesha County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on March 6-8, 1995 at Milwaukee, Wisconsin and April 4, 1995 at Waukesha, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge. At the request of the petitioner, a formal written transcript was prepared and made available to the parties in August of 1995. The parties submitted written briefs and the last brief was received on November 6, 1995.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Petitioner, Mr. Kurt F. Froebel, by

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FINDINGS OF FACT

1. Funk's Dam is located approximately one mile upstream of North Lake on the Oconomowoc River in the Town of Merton, in the N.E. quarter of the N.W. quarter of Section 15, Township 8 North, Range 18 East, Waukesha County. The Old Mill Dam was built around 1850 and rebuilt in 1890 and 1928. The dam was washed out in 1965 and in March of 1975. At the time relevant to decision of this case, in the summer of 1992, the dam consisted of three stop log section gates, each 3' wide and a 60' wide emergency spillway. The dam also involved a 350' long earthen embankment.

2. The dam washed out in 1965. In 1971, the Department notified dam owner Mr. Gerald Quinn that the dam was in poor condition and recommended repairs that were necessary to properly maintain the dam. There was a subsequent dam failure on March 12, 1975. The Department of Natural Resources issued an order requiring Mr. Quinn to repair the dam on May 6, 1975. The Department attempted to hold Mr. Quinn accountable for dam repair and satisfying the DNR dam safety requirements. Quinn refused to comply with the Department's orders.

3. On November 17, 1982, the Department issued a Determination that the dam was unsafe and abandoned and a Notice of the Department's intent to remove the dam. Mr. Quinn challenged the Department's Determination. However, the challenge was ultimately dismissed by the Wisconsin Court of Appeals on May 28, 1985.

4. On August 17, 1992, the DNR began its drawdown of the impoundment behind Funk's Dam in anticipation of dam removal. On August 18, 1992, the Department prepared a public notice requesting comments on its proposal to remove the Funk's Dam. The notice also sought public input on the Department of Natural Resources' Environmental Assessment (EA) for removal of the project.

5. On September 9, 1992, the DNR conducted a public informational hearing on the proposed removal of the dam and on the EA for the project. On October 2, 1992, the Department's contractor began removing Funk's Dam.

6. On October 12, 1992, the North Lake Management District filed a petition for a contested case hearing challenging the Department's decision to remove the dam. The contested case hearing was stayed pending judicial resolution of the issue of whether or not there was a right to a contested case hearing under sec. 227.42, Stats., on the EA conducted by the DNR on the dam removal decision. See: North Lake Management District v. DNR, 182 Wis. 2d 500 (Wis. Ct. App. 1994). The Wisconsin Court of Appeals held that there was no such right.

7. Petitioner Kurt Froebel submitted a Notice of Appearance, Notice of Motion and Motion to Intervene in this administrative review proceeding on December 19, 1994. On January 23, 1995, the Division granted Petitioner Froebel's motion to intervene and Petitioner Froebel submitted a Petition for a Contested Case Hearing on February 1, 1995.

8. At some point in 1986, Mike Bozek, of Water Resources, DNR Southeastern District conducted a mill pond sediment survey of the potential depth and distribution and transport of sediment then located upstream of the Funk's Dam. The object of the study was an analysis attempting to predict the amount of sediment to be washed out of the impoundment should the dam be removed and identification of the fact that under a failure a larger amount could be removed. (Ex. 4) The Bozek study undertook a cross section or transection across the stream channel to identify soft, transportable sediments as well as

compacted sediments. Bozek used a 1.5 inch diameter stick and poked the stick into the impoundment sediments in order to measure the amount of soft sediment potentially transportable. The pole method employed by Mr. Bozek was reasonable and appropriate under the circumstances. The methodology has been used by other experts in the field and is very similar to a technique used by the U.S. Army Corps of Engineers. (TR, pp. 676-677)

Bozek calculated a range of from 93 to 186 yards (80 percent water) to 23 to 46 yards (95 percent water) for the amount of sediment expected to be transported out of the channel and deposited downstream to the river and into North Lake. Bozek further estimated that 90 percent of the total potential sediment load was transported downstream when the dam failed in 1975.

The parties essentially agree that an error was made in Bozek's calculations. The 1994 R A Smith Study concluded that the Bozek study made an error in calculating the volume of transect 1 and that the correct range was "actually 610 to 1,220 cubic yards." The Bozek study underestimated the potential sediment available for transport upon removal of the dam and drawdown of the impoundment. However, the record is not clear as to how this underestimation affected the DNR drawdown/removal plans. Plainly, the Bozek study contemplated a potentially large volume of soft sediment available for transport. Further, in the EA, the Department observed that "an increase in the sediment load to the lake is expected during drawdown." (Ex. 8)

9. In August, 1991 the State Legislature passed legislation which authorized annual appropriations for fiscal years 1991-92 and 1992-93 for the removal of abandoned dams in the state by the Department of Natural Resources. Once appropriated funds became available, the Department began the process to remove Funk's Dam. A drawdown plan for the impoundment behind the dam was developed by William Sturtevant, Assistant State Dam Safety Engineer. (Ex. 5)

10. There is no real factual question that Funk's dam was unsafe and was dangerous to life health and property prior to removal by the Department. The Department was very concerned about the potential of flooding resulting from dam failure. A 1982 U.S. Army Corps of Engineers study determined that the dam provided no meaningful flood control for North Lake. Removal of the dam was expected to improve storage capacity of the floodplain and increase flood control for North Lake. (TR, pp. 168, 233, Ex. 8) Sturtevant conducted a ten-year inspection in 1988 and found the dam to be in very poor condition. The Department also believed that removal of the dam would reduce sediment transport in the area by stabilizing bottom sediments in the mill pond. (Ex. 8) A clear preponderance of the credible evidence supports a Finding that the Department's decision to remove the Funk's dam was reasonable given Department concerns about public safety and sediment transport.

11. The central issue in the case is whether the Department's implementation of its decision to remove the Funk's dam was reasonable, necessary and appropriate based upon information foreseeable to the DNR at the time of dam removal. The Bozek study made several recommendations to reduce the mass of sediment transported downstream: 1) Slowly lower water levels in the impoundment during dam removal. 2) Using a crane, dig a sedimentation pit in front of the present dam to act as in channel sediment pit. The crane can both be used to disassemble the dam and dredge the sedimentation pit as it fills during drawdown. Spoils should not be deposited in the wetlands adjacent to the channel. 3) Only one dam structure should be removed to concentrate flow through one stream channel and maximize depth there during low flows. 4) Mud flat areas should be seeded with a wildlife seed mixture to stabilize these areas. (Ex. 4, pp. 6-7)

12. At some unknown time in 1992, DNR Assistant Dam Safety Engineer William Sturtevant prepared a formal drawdown plan (Ex. 5) which set forth minimum requirements for the contractor undertaking draining of the mill pond. A summary of the features of the drawdown plan is as follows:

Steps and procedures for draining of the Funk's mill pond are:

- A. Erosion control in the form of a sediment barriers/traps must be placed prior to the initiation of the drawdown. Barriers are required to be installed both upstream and downstream of the dam.
- B. Install combination of pump(s) and syphons along the embankment and start draining the pond.
- C. Lift the top board of the gated section of the dam 1/2 of its vertical dimension.
- D. As the pond is drained, rocks are to be removed from the breached section of the dam equal in elevation to the water level in the pond.
- E. Allow the pond to drain until the water level has stabilized at an elevation even with the bottom of the raised board.
- F. Continue to work at removing the rocks and concrete in the breached section of the dam as the water levels in the pond recede. The river will form a channel upstream of the breached section. Once use of the pumps and syphons becomes inefficient, remove the rocks and

concrete in the breached section of the dam until the pond is completely drained.

- G. Remove rock and concrete fill in the existing breach area so as to drain the remaining portion of the pond at a rate not to exceed 0.5 feet per day.
- H. The breached section of the dam is to be opened up to a bottom dimension of no less than 45 feet with 3:1 (horizontal:vertical) side slopes.
- I. The rock and concrete removed from the breach area shall be used along the side slopes of the breach in order to reduce further erosion of the earthen embankment.
- J. Sediment collected in the downstream sediment trap shall be left in place if outside the defined stream channel and removed by hand if deposited in the stream channel.
(Ex. 5)

13. There is no question that some significant features of both the Bozek recommendations and of the Sturtevant drawdown plan were not followed during dam removal. No sediment pit or basin was created upstream of the dam as recommended by Bozek. No sediment trap or barrier was placed upstream of the dam as contemplated by the drawdown plan. Downstream sediment traps were not effective nor properly pumped by the contractor. No pumps and siphons were installed along the embankment prior to drainage. Nor was all of the dam removed. The Department argues that on-site conditions made it infeasible to follow all of the above recommendations and that there were legitimate reasons for the failure to follow the particulars of the drawdown and removal plans. The petitioner argues that failure to follow the plans and to undertake certain other sediment control measures led to massive sediment discharges that could have been prevented. Accordingly, the alleged defects must be considered separately and as a whole to properly determine the reasonableness of the Department's implementation of the dam removal.

14. UW-Milwaukee Professor Jerry Kaster of the Great Lake Studies and Biological Sciences Department, testified on behalf of the petitioner. Kaster testified that excess amounts of sediments transported were the result of the Department's failure to build a large sediment settling basin, preferably in front of the dam spillway. (TR, p. 591)

Kaster concluded as follows:

. . . the fact is that neither of these settling basins were constructed as recommended by the DNR personnel. And that's

where the trouble began. It is possible to retain sediment, but it has to be done in a proper way, and it just -- I mean, when you walk on site and see what had been constructed to retain that sediment, the first thing anyone could do, including a lay person, is shake their head. Those sediment basins were simply too small. Id.

The DNR argues that it was impossible to build the upstream sediment basin because of engineering problems in creating a basin large enough to be effective. The Department argues further that efforts to create such a basin would have re-suspended virtually all of the sediment in the impoundment and released a much larger volume of sediment. However, it is not at all clear from the record why these conditions were not foreseeable to Department personnel. As early as 1986, as the EA notes, the Department estimated a cost of \$2500.00 for construction of a sedimentation basin. (Ex. 8, p. 2) The Department was well aware of public concerns relating to the release of sediment at the time of dam removal. The record is replete with concerns on this exact issue expressed well prior to design of the drawdown plan. Further, prior to the implementation of dam removal, Sturtevant had been to the site at least five or six times. (TR, p. 31) Sturtevant was aware or should have been aware of the soft sediment in the area, the lack of room for a large settling basin and the size of the impoundment. If the DNR was unable to oversee construction of such a settling basin in front of the spillway, Kaster opined, then the Department should have followed the recommendations described by former DNR water quality planner Neil O'Reilly. (TR, pp. 591, Ex. 43) O'Reilly prepared a Recommended Erosion Control Plan that included specific plans for the placement of a sedimentation basin in front of, that is upstream of, the Funk Road Bridge. O'Reilly recommended that such a basin could have been constructed by placing either a sandbag dike, or steel or wood sheet pile structure in front of three culverts in the area to create a controlled impounded area. (Id.) The record does not adequately explain why the measures recommended by Bozek and O'Reilly could not be implemented. (TR, pp. 700-701) Further, if larger sedimentation basins could not have been constructed, the Department should not have represented to the public that it would build them, nor that the DNR's efforts to collect sediment would be adequate to protect the navigable waters of the river and North Lake.

15. Other suggested erosion control features were not followed. The downstream sediment basins were too small to be effective. The drawdown plan called for pumping of downstream sediment traps. Sturtevant testified that the Department twice tried to pump the sediment traps but that these efforts were unsuccessful because the material was so fine it re-suspended itself before the suction hoses could become operative. (TR, p. 65) North Lake Management Commissioner Terry Prust testified that he had actually observed the Department's contractor pumping sediment from silt traps back into the river. (TR, p. 451) When Prust asked them what they were doing, the contractor's excuse was that the DNR did not tell them what to do with it. In fairness to the Department, this was clearly not true, as the Department's bidding contract clearly specified areas to deposit this sediment. Prust

concluded that the whole operation did not work as the DNR had hoped it would and that the drawdown was not undertaken professionally or well planned. (TR, p. 455)

16. Heavy rains occurred during the drawdown and removal efforts, causing the impoundment to fill several times. This required further drawdowns and discharged additional sediment into the river and lake. (TR, p. 300)

17. As noted, not all of the dam was removed as had been hoped. The Department's EA had warned against partial removal of the dam for the following reasons:

Remove the existing concrete spillway and emergency spillway. This option would leave the placement of the earthen embankment. While eliminating some of the water quality problems the most significant drawback to this option would be the potential failure of the earthen embankment during high water.

The RA Smith 1995 draft study concluded that this prediction had essentially come true and that the streambank erosion near the dam needed to be stabilized after the partial dam removal. The RA Smith study suggested that streambanks would benefit from placement of rock riprap on the 100 feet of streambank on the east bank downstream from the outlet. The study also recommended that the structural integrity of dam breach itself be stabilized. (Ex. 24, Chapter 4)

18. A considerable amount of sediment was discharged into the Oconomowoc River as a result of the removal of Funk's Dam. The petitioners established through photographs and testimony that large new muck and silt bars were formed after the dam abandonment. (TR, pp. 619-620; Exs. 32-35) Formation of these unstable mud flat areas were the direct result of the dam removal. The R.A. Smith sediment analysis concluded that the partial dam removal was "likely responsible" for the recent sediment deposits downstream in the Oconomowoc River and in North Lake. The report noted that there are noticeable sediment beds downstream of the STH 83 bridge and in the inlet to North lake; and these beds have possible negative effects on the fishery of the river and lake as well as the water clarity of the lake. (Ex. 25, Conclusions)

Further, the petitioners established that a large amount of silt not visible from the land surface was deposited into North Lake (TR, p. 573) and that such a volume of sediment would be damaging to organisms in the river and lake. (Kaster, TR, p. 594)

Kaster performed testing of sediment transport from the Funk's Dam mill pond to North Lake before during and after the drawdown and partial removal of the dam. All of these studies confirmed that a large volume of sediment was transported as a result of the dam removal and that hundreds of tons of excess sediment continue to be deposited in North Lake as a result of the partial dam removal. (TR, pp. 584-585)

19. A preponderance of the credible evidence supports a finding that a large amount of sediment was discharged into the Oconomowoc river and into North Lake as a result of the partial removal of the Funk's dam. The record taken as a whole also establishes that these navigable waterways have been detrimentally impacted by the manner in which the partial dam removal was undertaken. It is difficult to sort out what portion of the increase of sediment transport is directly the result of the failure of the Department and its contractor to undertake the dam removal in a manner that better limited sediment transport. What is clear from the record is that the possibility of transport of a large amount of sediment was foreseeable to the Department. The DNR had sound reasons for removal of the dam; the Department properly planned for removal of the dam. However, as the dam was removed, the Department was too quick to throw out its drawdown and removal plans as being impossible to perform. While it is difficult to sort through the cause and effect of the Department's actions in this case, the evidence supports a finding that the failure to follow the recommended drawdown and removal plans was a cause of the release of a large volume of sediment into public waters.

20. This case has a unique and extensive procedural posture that raise serious issues as to the jurisdiction and authority of the ALJ. This case was not noticed as an enforcement action or as a hearing on the reasonableness or necessity for any remedial actions by the Department or its contractor. There is no specific statutory authority for the ALJ to Order remedial actions by the Department or its contractor in light of the Division's conclusion that the failure to follow the drawdown and removal plan contributed to the release of sediment into the waters of the state. Under these circumstances, the ALJ believes the best course is to remand the case back to the Department to take such actions as the DNR sees fit under the circumstances.

21. The Department did not error in failing to require a Wisconsin Pollution Discharge Elimination System (WPDES) permit in connection with dam removal. Vollbrecht and Sturtevant testified that the Department does not require WPDES permits for dam removal in addition to permits under Chapter 31. Vollbrecht testified that such a WPDES permit would likely have had similar conditions as the Chapter 31 permits.

22. The restoration of the dam is not feasible and may result in the transport of significant amounts of sediment. At the hearing prior petitioner counsel Lonsdorf essentially waived the issue of reconstruction of the dam, stating that the petitioner had no interest in putting back the dam. Further, reconstruction of the dam to meet existing dam standards would cost several hundred thousands of dollars. There is nothing in the record that any party would be willing to assume ownership and maintenance of the dam in the event it was reconstructed. Taken as a whole, there is no evidence in the record which would justify the extreme step of reconstruction of the dam. Further, this issue is outside the scope of the review of the reasonableness of and necessity for the decision to remove Funk's dam.

DISCUSSION

Several years have passed since the removal of the Funk's Dam in the late summer of 1992. The contested case was continued for over two years, as North Lake Management District (NLMD) pursued the Environmental Assessment issues in the appellate courts. This decision, accordingly, will reflect a degree of hindsight not available to Department employees at the time of removal of the dam. The Department properly sought removal of an abandoned and unsafe dam. The DNR's efforts to plan for removal of the dam were reasonable. The actual removal was plagued by heavy rains, which played a big part in the release of far more sediment into the Oconomowoc river and North Lake than expected. Further, on site conditions made it difficult to follow the Department's plans, and the Department's contractor apparently employed individuals who did not understand the basic purpose of sediment traps. The result was release of a large amount of sediment into the river and lake. The parties both raise legal issues as to the jurisdiction of the ALJ to order the Department to take remedial measures nearly four years after the underlying events in this case.

The Department argues under Village of Thiensville v. DNR, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986), that the Department's decision must be reviewed in terms of the data and information available to the Department at the time the decision to remove the dam was made. Village of Thiensville, was a WPDES case interpreting sec. 147.20(1)(b), Stats. The Court of Appeals held, first, that the hearing examiner properly refused to admit evidence or to allow any challenge to WPDES permit terms that were not affected by the specific permit modification noticed by the Department. Other conditions of the permit, not modified by the DNR and not timely appealed by the petitioner, were held to be outside the review under sec. 147.20, Stats. Id., p. 282. Secondly, the Court of Appeals held that sec. 147.20, Stats. required that the hearing examiner limit his review to events which had been considered by the DNR. Id., p. 283. Village of Thiensville, therefore, affords administrative agencies fundamental fairness in ensuring that review proceedings have finality and focus on the issues at hand or reasonably foreseeable to the Department. While Village of Thiensville is not a Chapter 30, Stats. case the ALJ believes these principles should be operative in most administrative review proceedings. The ALJ finds that the question of sediment loading into the river and lake are directly related to the reasonableness and necessity of the drawdown and removal efforts and that these issues were reasonably foreseeable to the Department. (See: Finding #14) The RA Smith studies are therefore considered only for the limited purpose of correcting and commenting upon information available or reasonably foreseeable to the Department.

The instant hearing was not noticed or contemplated as a hearing on the appropriateness of possible plans to remediate sediment loadings. The petitioner argues that the ALJ has authority to Order remedial measures by the Department pursuant to sec. 30.03(4)(a), Stats. It seems clear that this provision governs Chapter 31, Stats., proceedings as well as those specifically under Chapter 30, Stats. Sec. 30.03(2), Stats., states that the

attorney general is authorized to bring proceedings to "abate any nuisance committed under this chapter or Ch. 31." Sec. 30.03(4)(a), Stats., states in pertinent part:

If the department learns of . . . a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by the imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph The department may order a hearing under ch. 227 concerning the possible . . . infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. . . .

The petitioner argues that this section authorizes the ALJ to enter "whatever injunctive orders are necessary to effectuate the purposes of the statutes--in this case to order restoration of the environmental conditions of the former Funk's Dam impoundment, the Oconomowoc River and North Lake." (Petitioner's Brief, p. 30)

The ALJ believes the petitioner overstates the authority of the Division in this matter. On its face, sec. 30.03, Stats., requires "a hearing under ch. 227" specifically relating to a "possible infringement of the public rights relating to navigable waters." As DNR counsel notes, the instant proceeding was not noticed as a sec. 30.03, Stats., enforcement proceeding. Further, such a hearing is contemplated under the statutes only in instances where "the department determines that the public interest may not be adequately served by the imposition of a penalty or forfeiture." In this case, the Division lacks authority to impose a forfeiture or penalty upon the Department. The record would not support entry of such a forfeiture or penalty in any event, as the department has not violated any prior condition or order justifying entry of such a forfeiture. Accordingly, sec. 30.03, Stats. does not provide authority for the ALJ to reach the issue of the proper remedies to restore the environment in light of the release of sediment.

The Petitioner also argues that sec. 31.185(5), Stats., provides a basis for legal authority for the Division to order that remedial actions be undertaken by the Department. However, this provision is inapplicable to the present situation. On its face, sec. 31.185(5), Stats., applies only in cases where DNR is issuing a permit to an applicant to abandon a dam. That statutory subsection provides:

31.185(5) As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to

preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

It is evident that this statutory provision is inapplicable to the current proceedings since the DNR is not required to obtain a permit to abandon a dam, but is specifically authorized under sec. 31.187, Stats., to remove abandoned dams.

The ALJ concludes that the Division does not have authority to Order the Department to draw up a remedial plan to address the sediment loading in the Oconomowoc River and North Lake. Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co. v. State Board of Health, 243 Wis. 440, (1944).

The ALJ can find no express nor necessarily implied authority to order remedial actions by the DNR under this unique fact situation. Further, it would be fundamentally unfair to require specific remedial actions by the DNR when the Department has not had the opportunity to specifically address these issues at hearing. As a practical matter, on the basis of the limited and largely one-sided evidence presented at hearing, some remedial actions by the Department or its contractor would appear to be in order. The RA Smith 1995 draft study may well represent a basis for the restoration of the river and the stabilization of the area to prevent further sediment loading into these waters. However, it is not for the ALJ to determine that issue definitively in the context of the present proceeding.

The petitioner argues that the DNR did not allow sufficient opportunity for public comment prior to the decision to remove the dam. The public informational hearing in this case was held after the slow drawdown was begun. Clearly, the better practice would be to begin drawdown of an abandoned dam to be removed after holding the required public informational hearing. However, Department did comply with the procedural requirements by holding the September 9, 1992, public informational hearing prior to the actual removal of the dam. This is all that is required under sec. 31.253, Stats. Overall, this case and the participation of the petitioner, who did not himself file a petition to review until after the withdrawal of the NLMD request for a hearing, speak volumes as to the Department's efforts to include the public in its Chapter 31, Stats. process.

Finally, the ALJ does not accept the proposition that the DNR needed to require a WPDES permit in connection with its dam removal efforts. Department witnesses testified that the conditions of such a permit would clearly overlap with requirements for dam removal. Accordingly, the petitioners arguments as to requirement of an additional WPDES permit are without merit.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to Ch. 31 and sec. 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact to hear contested cases and issue certain statutorily defined necessary Orders in cases involving abandonment of dams on navigable waters.

2. Section 31.185(5) states that as a prerequisite to the granting of a permit to abandon a dam the Department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

3. The DNR may remove or cause to be removed, in such manner as it deems fit, old and abandoned dams in this state, upon giving 60 days notice in writing to the owner thereof, if the owner can be found. Sec. 31.187(2). The Department met all procedural requirements, of this section by issuing Notice of Intent to remove Funk's Dam on November 1, 1982, pursuant to then sec. 29.04, Stats.

4. Section 31.253, Stats. requires that the DNR hold a public informational hearing on the proposed removal of a dam when such a hearing is requested, as in the instant case, prior to seeking or causing the removal of the dam under Chapter 31, Stats. The DNR complied with this procedural requirement by conducting a public informational hearing on September 9, 1992 in the Town of Merton.

5. The DNR has authority, in the interest of public rights in navigable waters or to promote safety and protect life, health and property, to regulate and control the level and flow of water in all navigable waters pursuant to sec. 31.02(1), Stats. This section does not specifically authorize the Department to begin the drawdown process for dam removal without entry of a specific order by the DNR. No such order was entered in this matter.

6. Section 30.03(2), Stats., states that the attorney general is authorized to bring proceedings to "abate any nuisance committed under this chapter or Ch. 31." Section 30.03(4)(a), Stats., states in pertinent part:

If the department learns of . . . a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by the imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph The department may order a hearing under Ch. 227 concerning the possible . . . infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters

The instant contested case hearing was not noticed as an enforcement proceeding under this subsection, nor would it have been appropriate to have done so. Section 30.03, Stats., does not provide legal authority for the Division to Order specific remedial actions in this matter.

7. Under Village of Thiensville v. DNR, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986), the Department's decision must be reviewed in terms of the data and information available to the Department at the time the decision to remove the dam was made. The ALJ has relied upon the subsequent RA Smith studies for the limited purpose of correcting errors in earlier Department calculation of sediment loadings and commenting on information available to the DNR at the time of its decision to remove the dam.

8. The DNR in seeking removal of the Funk's Dam was not "the owner or operator of a point source discharging Pollutants into the waters of the state" within the meaning of sec. 147.025(1), Stats. No WPDES permit is necessary in connection with either removal of the dam or any continuing sediment transport emanating from the Funk's Dam.

ORDER

Wherefore IT IS HEREBY ORDERED, that this matter be REMANDED back to the Department of Natural Resources for such actions as the agency in its discretion deems appropriate.

Dated at Madison, Wisconsin on February 21, 1996.

STATE OF WISCONSIN
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.